

LYNCHBURG CITY COUNCIL

Agenda Item Summary

MEETING DATE: **May 28, 2002**

AGENDA ITEM NO.: **3**

CONSENT:

REGULAR: **X**

CLOSED SESSION:

ACTION:

INFORMATION: **X**

(Confidential)

ITEM TITLE: **Revision of Cable Television Ordinance**

RECOMMENDATION: No action is required at this meeting. A complete replacement of the current Cable Television (CATV) ordinance is being presented for discussion. It is anticipated that this ordinance will be considered for adoption by City Council at a Public Hearing on June 11, 2002.

SUMMARY: The CATV franchise of the current franchisee expires in March, 2003, and it is recommended that the CATV ordinance be updated before franchise renewal negotiations begin so that the ordinance reflects recent changes in the CATV industry. The City has retained the services of a CATV franchising specialist, Municipal Services Associates, Inc. (MSA), to assist in updating the ordinance. A complete replacement of the ordinance is proposed, although much of the existing ordinance is retained. A summary, prepared by City staff, is attached which provides a high-level description of the most significant changes. Additionally, a more detailed summary prepared by MSA is attached, describing all new topics covered in the proposed ordinance and any sections from the current ordinance that have been retained but extensively revised.

PRIOR ACTION(S): N/A.

BUDGET IMPACT: None.

CONTACT(S): Mike Goetz 847-1341 x286

ATTACHMENT(S):

1. Executive Summary – Cable Television Ordinance
2. Letter from Municipal Services Associates, Inc., regarding CATV ordinance changes

REVIEWED BY:

EXECUTIVE SUMMARY CABLE TELEVISION ORDINANCE

BACKGROUND

It is proposed that the City's Cable Television (CATV) ordinance be completely replaced, reflecting changes in the regulatory environment and changes in technology and the industry.

SUMMARY OF SIGNIFICANT ORDINANCE CHANGES

1. Both federal regulations and technology in general have changed significantly since the last ordinance revision, so several definitions of new terms have been added, including definitions for a "cable system", a "video provider", and many service-related terms.
2. A section has been added (Sec. 12.1-13) requiring quarterly reports on the franchisee's operations, including the number of connections, disconnections, outages, and calls received.
3. Sec. 12.1-14 states that CATV facilities must be underground in areas where both electric and telephone facilities are required to be underground. CATV can be above ground where either electric or telephone is above ground.
4. Sec. 12.1-19 now requires the delivery of a minimum of 90 channels. This is currently being met by the existing franchisee.
5. Concerning the use of the public right of way along streets (Sec. 12.1-20, Use of Streets), the franchisee is required to notify the City of all work before they begin. The proper maintenance of trees in the right of way has been a problem, so language has been added to give the City the right to supervise tree trimming or to do the trimming itself, at the expense of the franchisee. Also, the requirement for the franchisee to adhere to the excavation standards and procedures maintained by the Department of Public Works is now explicitly stated.
6. Language is included in Sec. 12.1-27 that clearly states that the franchisee is subject to the business license tax, should the City decide to assess this tax.
7. The right of the City to audit and inspect franchise fee calculations has been clarified in Sec. 12.1-27. Also added is the ability for the City to require payment for the audit from the franchisee if the franchise fees have been underpaid by more than four percent.
8. The categories of CATV programming services that are required to be carried are listed in Sec. 12.1-28. High-speed Internet service, i.e. cable modem, is listed with a qualification that it first must be classified as a CATV service. Recent federal rulings have indicated that this service will not be classified as a CATV service; however, this subject is still under debate.
9. Sec. 12.1-30 includes language requiring an audio emergency override of the CATV system to allow the broadcast of emergency messages, in accordance with Federal Communications Commission (FCC) regulations.
10. Customer service standards are delineated, as defined by the FCC, in Sec. 12.1-31 and 12.1-32. These standards require calls to be answered within 30 seconds 90% of the time, measured quarterly.
11. Sec. 12.1-40 allows for fines up to \$750/day to be assessed for any violation of the ordinance, including customer service standards. A violation procedure is defined in Sec. 12.1-40, including the right of the franchisee to be heard and to have the opportunity to cure any violations before a fine is assessed.



Stuart G. Chapman
President

March 25, 2002

Mr. Michael Goetz, Director of Information Technology
City of Lynchburg, Virginia
863 Church Street
Lynchburg, Virginia 24504

Dear Michael:

The City of Lynchburg has requested a description of the changes to its Cable Television Ordinance that have been addressed in the draft Ordinance which was sent to you today. Overall, the Ordinance has been modernized in order to address current states of technology, law, and regulation, as well as general practices used by cable operators and franchising authorities. A summary of the changes follows below:

Definitions: A number of new definitions were added. These include a definition of "Act" which incorporates the 1984 and 1992 Cable Acts along with the 1996 Telecommunications Act; A definition of "Cable System" which follows the 1996 Telecommunications Act; A definition of "Cable Operator" which also includes "Multichannel Video Operators", operators who serve apartment complexes or multiple dwelling units which piggyback their operations on phone lines or other telecommunications carriers; Several definitions related to customer service, which include definitions of "Complaint", "Normal Operating Conditions", "Normal Business Hours", "Service Interruption", "Outage" and "Service Call"; A definition of Gross Revenues which is more inclusive of revenues derived from cable service than the existing definition; and a definition of "Subscriber Drop" for the purpose of addressing unbundled cables. Most of the definitions found in the current Ordinance were retained.

New Franchises: This section has been modernized slightly to allow for new franchise applicants to include e-mail and website addresses. Also, the application fee has been raised to \$5,000.00 and the amount for recovery of expenses needed for the preparation and granting of the franchise not found in the current Ordinance has been included and capped at \$50,000.00. A requirement has been included which requires proposers to indicate if they have ever been investigated, indicted, or convicted. A process addressing questions offered by proposers has been added in Section 12.1-6(c).

Grant of Authority: A clause has been added stating that all franchises are non-exclusive.

Records: Sections regarding Service Availability and Record Request and a new Section on the Availability of Books and Records which expands upon existing language has been added in Section 12.1-13. The new section calls for quarterly provision of a service profile covering the Franchise Area (connections, disconnections, outages/interruptions, number of calls received), reports on temporary Subscriber Drops (Temporary drop burial requirements are found in Section 12.1-33), Complaint resolution data, and construction update reports.

Cable System Construction: Much of the existing language was retained. Extensions of plant are now subject to the 125-foot installation standard set by the FCC in 1992. A section on underground installation has been added (Section 12.1-14(b)).

Permits: A new section on plan review and permits has been added which builds upon existing requirements found in agreements with utilities. Language found in these agreements has been placed into the proposed ordinance in order to promote more standardization of requirements. As-built plans are required to be submitted, including those in CAD files.

Construction and Technical Standards: These standards have been merged into one Section (Sec. 12.1-18) and expanded to include compliance with NCTA cable system construction standards, the National Electrical Code, National Electrical Safety Code, and Bell System Code of Pole Line Construction (Verizon standards), along with FCC, USDOT, and OSHA standards. This section also requires standby power for the cable system, and licensing of contractors and subcontractors. Technical standards requirements follow those promulgated by the FCC (47 U.S.C. §76, Subpart K) and enforcement of the standards is tied to the ruling in FCC docket proceeding 99-57, released March 29, 1999 allowing and encouraging municipal enforcement of technical standards.

Required Services and Facilities: This section has been modernized to require a minimum of 90 channels without regard to method of delivery. FCC regulations prevent franchising authorities from specifying the method of channel delivery or transmission technology. Parental “lockout” controls and electronic status monitoring are required in this section.

Use of Streets: Much of the original language of the current Ordinance was retained. Clauses have been added to address emergency removal of facilities, and the location of pedestals and vaults. Tree trimming requirements have been added to this Section, including the ability of the City to supervise tree trimming activities or do the trimming itself at the expense of the cable operator. Removal of the cable system in the event of termination or revocation has been included in this section.

Indemnification and Insurance: No major changes. Coverages have been raised to \$5,000,000 for bodily injury or death, property damage, and all other types of liability, insurers must be rated A- or better by Best's Insurance Rating Services, and a clause has been added for grantees who self-insure all or part of their coverage. Naming of city employees, officers, and agents as insureds on the insurance certificate has been clarified.

Forms of Security: Initial franchises will be required to post an irrevocable letter of credit of \$200,000, and a cash security deposit of \$10,000. Renewed franchisees must post a \$100,000 letter of credit and a cash security deposit of \$10,000. Requirements to replenish letters of credit or cash security deposits if either are drawn upon have been added.

Construction Security: Construction Bonds and Removal Bonds found in standard utility agreements have been carried over to this Ordinance.

Transfers of Ownership or Control: Language has been expanded in order to allow for the City to grant consent for transfers of control or ownership, or assignments. The 120-day review requirement found in the Cable Act has been added, along with the 30-day requirement for requesting additional FCC 394 Form information. Language requiring the transferee to comply with the terms and conditions of the franchise agreement has been added.

Franchise Review and Modification: This is a new section which follows Section 625 of the Cable Act (47 U.S.C. §545) regarding modification of franchise agreements.

Rates and Fees: Clauses requiring rate uniformity, non-discrimination, and the filing of rate schedules with the City have been added. Reservation of rights to regulate cable service has been clarified.

Payment of Franchise Fees: Original language from the current ordinance has been retained. Changes include a clarification of the right to audit and inspect franchise fees, assessment of costs of the audit or inspection if the grantee has underpaid franchise fees by more than 4 percent, the ability to charge interest of two points over the prime rate if underpayments are not made on time, and the filing of an annual statement of gross revenues and franchise fees in addition to quarterly filings. In addition, a process for increasing the percentage of franchise fees, if allowable by law, is included, which incorporates a public meeting for discussion of the increase.

Cable Programming Services: 13 categories of cable service have been added. At this time, high-speed Internet service is included as a category, however, a recent declaratory ruling that high-speed Internet access is an information service, and not a cable service, may lead the City to delete this requirement if it wishes to do so in advance of the final rulemaking process on this matter. Dedication of Public, Educational, and Government Access channels has been included and the existing language has been strengthened. In the event that a second cable provider serves Lynchburg, a section (12.1-28(i)) has been added allowing for distribution of Government produced programming to both cable providers.

Emergency Override: A new clause which sets procedures for providing emergency override of the cable system in the event of emergencies or disasters has been added. This clause also requires participation of cable operators in the Emergency Alert System (EAS) and joint development of an emergency notification plan between the City, the grantee, and Amherst, Bedford, and Campbell Counties.

Customer Service Standards and Consumer Protection: The customer service standards developed by the FCC in 1993 have been added. These address telephone answering times, availability of customer service representatives, repair service response and installation response standards, billing requirements, establishment of normal business hours for customer service centers operated by the grantee, telephone answering and service response under normal operating conditions defined for this section, a four-hour time block for appointment windows, required communications by the grantee to its subscribers, and a process for issuance of refund checks. A separate consumer protection section (Sec. 12.1-32) has been added in order to address specific concerns regarding credits for service interruptions, repair service requirements, advance notice to residents prior to scheduled system construction, identification of customer service representatives and technicians, return of deposits for accessory equipment (converter boxes, cable modems), installation standards, and complaint procedures.

Notice to the Grantee and Public Notice: Provisions for notice to the Grantee have been clarified and expanded to allow for faxes and overnight delivery service. Notice of public meetings concerning the Grantee has been described more fully. Public notice requirements under Virginia law are referenced along with notification of franchise evaluation sessions to be publicized over the Government Access Channel.

Forfeiture and Termination: Language has been added to describe material violations of the Ordinance or Franchise Agreement. Additional material violations for which forfeiture or termination may be applicable have been added (Sec. 12.1-38(a)6.-15.), along with a process for notice, opportunity to cure, and answer to breach have been added in order to provide for due process.

Penalties: The language in the current franchise regarding liquidated damages has been converted to an Ordinance penalty clause. Liquidated Damages (Sec. 12.1-41) are enabled in this Ordinance, however, they will be more fully described in the Franchise Agreement. The penalty process sets forth notice, answer, and opportunity to cure provisions, along with an opportunity to be heard. Again, this process is designed to preserve due process. Fines have been increased to \$750.00 per day per offense.

Performance Evaluation Sessions: Language from the current Ordinance has been expanded in order to allow cable system plant testing which may be supervised by a professional engineer.

Contemporary Technology: The nature of this clause, which, in the current Ordinance, is a “State-of-the-Art” clause, has been modified in order to address the ever-changing status of the “State-of-the-Art”. The concept of contemporary technology is used instead, since it suggests a wide variety of technological systems and media which may be used to improve the cable system and provide additional services, without conditioning any specific type of technology. Much of the original and current language has been retained.

Rights: Rights reserved to the City and to individuals have been placed in sequence. Section 12.1-45 (Rights Reserved to City) includes a specific statement allowing the City to exercise its police powers, and to have the power to pass additional regulations necessary in the exercise of its police powers affecting the health, safety, and welfare of the public.

Privacy: References to the grantee’s adherence to privacy provisions found in Section 631 of the Cable Act (47 U.S.C. §551) have been added.

Compliance With Laws: A statement requiring compliance with laws of the Commonwealth of Virginia and the federal government has been added.

Notice to Comply: Language regarding the grantee’s adherence to compliance periods has been added, along with the designation of an agent for notification and a clause requiring the grantee to comply with terms and conditions of the franchise even if the City has failed to enforce compliance.

Prohibited Acts: This clause supplants the “Violations” clause found in the current Ordinance. Section 12.1-56(a) is a modernization which includes a prohibition on theft of cable service through wiring or programming of computer hardware or software. Fines for violations in this Section have been raised to \$750.00 per day per occurrence.

Mr. Michael Goetz

Page 6

Limits on Grantee Recourse: This clause has been added in order to prevent the grantee from challenging the Ordinance or the Franchise Agreement or any of their terms, conditions, or provisions as being unreasonable, arbitrary, or void unless such terms, conditions, or provisions have been preempted by laws of the Commonwealth of Virginia or the federal government. This clause also adds a provision that a grantee must acknowledge in a franchise agreement that it was not induced to accept a franchise by any promise by the City or a third person, or that it made any promises or inducements regarding receipt of the franchise.

Savings Clause: Section 12.1-61 provides a "Savings Clause" which establishes the relationship between the Ordinance and the Franchise Agreement, and the prevalence of the Ordinance over the Franchise Agreement, unless otherwise provided for in the Agreement. This clause also prevents the indirect amendment of the Franchise Agreement by a change to the Ordinance without an amendment to the Agreement, and that no unilateral action may be taken to change the Agreement unless required by a superior authority.

Delegation of Powers: Section 12.1-63 allows the City Council to delegate its powers, duties, or rights under the Ordinance to any appropriate officer or employee or department of the City. An exception is made for the powers of revocation and rate regulation.

Should you have any questions regarding the changes to the Ordinance outlined in this letter, please contact me. In any event, I look forward to working with you and Walter Irwin on moving forward with the Ordinance.

Sincerely,

A handwritten signature in black ink, appearing to read "Stuart Chapman", with a stylized flourish extending from the end.

Stuart Chapman

President